UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LARRY W. MEIER
v.
DEPARTMENT OF THE INTERIOR

Docket No.
SE075209007

OPINION AND ORDER

This case comes before the Board on petition for review filed by the Bureau of Indian Affairs, Department of the Interior.

I. STATEMENT OF FACTS

Respondent Meier was employed as a Teacher (Social Studies), GS-1710-9, at the petitioner's Mt. Edgecumbe School, Mt. Edgecumbe, Alaska. Pursuant to notice dated February 14, 1979, he was informed of a proposal to remove him from his position for "your immoral and notoriously disgraceful conduct adversely affecting the employee/employer relationship between yourself and the Bureau of Indian Affairs." Three specifications to the charge asserted that, between October 7 and 13, 1978, he had sexual relations with a male student on three occasions.

Respondent submitted both written and oral replies to the charges. He was subsequently informed in writing that the first and second specifications to the charge were supported by the preponderance of evidence and were sustained, but that the third was not so supported, and was not sustained. Because of the finding on the first two specifications, he was removed on June 20, 1979.

Respondent submitted a timely appeal to the Seattle Field Office of the Board. He requested a hearing in connection with the case but withdrew it because the scheduled date and location of the hearing were inconvenient. The presiding official's decision was therefore based on the record and the written submissions of the parties.

After examining the evidence and the contentions advanced on appeal, the presiding official found that the agency had failed to support the charge and specifications by a preponderance of the evidence. In arriving at this decision, he found the following factors significant: the third specification, which the agency had itself found not sustained, reflected adversely on the veracity of the student in question (referred to as Student X in the decision);

the number and quality of the character references submitted in support of respondent (from teachers, students, and others) added credibility to his statements; Student X had emotional problems which began before the dates set forth in the charges and had a reason to fabricate the story which led to the charges; two statements submitted for the record demonstrated that one of the incidents could not have happened as Student X alleged; and neither the results of a polygraph test taken by the student nor the statement of a psychologist that the student, in his view, was being truthful, were entitled to "significant" weight in the assessment of veracity. The presiding official reversed the agency decision and ordered it to cancel the removal. The agency filed a timely petition for review.

II. ISSUES

The agency's petition for review argues that the initial decision contains an erroneous interpretation of law and that new evidence is available for the Board's consideration. The first argument is directed toward the presiding official's citation of the case of *Pulakis v. State of Alaska*, 476 P.2d 474 (S. Ct. of Alaska, 1970) in support of the "exclusion" of the results of the polygraph test. The agency contends that the qualifications of the polygraph examiner were a matter of record, contrary to the presiding official's finding; that although the *Pulakis* rule may be appropriate for cases involving a jury, it is not appropriate for a non-jury case such as this; and that it was error not to draw an adverse inference from respondent's decision not to take such a test himself. The agency also contends that the presiding official erred by substituting his judgment for that of management, and overstepped his authority by ordering that respondent be returned to the agency by cancellation of the removal action.

The argument concerning new evidence relates to four items in the record before the presiding official which the agency contends he failed to consider. The agency submits that the presiding official's error should now lead the Board to treat these items as new evidence. These items include the psychologist's analysis of Student X; the statement of Student X's roommate that Student X told him of the encounters with respondent; the inconsistencies in one of the statements submitted on respondent's behalf and the written statement of Student X, which the agency argues the presiding official misinterpreted in one respect.

The agency has also indicated in its petition that it was unfairly deprived of an opportunity to present its case fully when respondent withdrew his request for a hearing. It contends, as well, that the dismissal of the third specification was due to the agency's

fault in charging the occurrence of the encounter on the wrong date, rather than to a lack of credibility of Student X. Finally, it contends that even if the petition for review is not granted, the Board should reopen the case on its own motion for reasons similar to those advanced in support of the petition.

In reply, Respondent refers to what he considers to be the weaknesses in the agency's case, and concludes that the agency has submitted no new evidence, but has only attacked the findings of fact made by the presiding official.

III. DISCUSSION

The agency's allegation of error in the interpretation of law is directed toward the presiding official's reliance on an Alaska court case concerning the validity of polygraph examination results. That case held that such tests lack sufficient reliability to be admitted into evidence in that jurisdiction. The presiding official correctly cited it as a factor for consideration in assessing the weight to be given the evidence. He did not decide to exclude the evidence concerning the polygraph examination, however, and we find that decision was also proper. Moreover, we find that the agency's assertion that the presiding official relied on the results of the polygraph to attack the credibility of Student X, who took the test, but then found that the results of such tests were inadmissible, represents an incorrect reading of the initial decision.

The presiding official included the results of the polygraph examination (both those favorable to the student and those which were not) in his discussion of the evidence submitted by the agency, and cited the *Pulakis* case, *supra*, as authority for the proposition that in Alaska the courts have held that such tests lack sufficient reliability to be admissible as evidence. He then stated:

> Finally, there is other evidence here which is of significant probative value in determining the validity of the charges. Therefore, I do not find the appellant's failure to take the examination to be an admission of guilt, nor do I find that it raises an adverse inference in the case. At the same time, I do not find the results of Student X's test to be of significant importance in determining the truthfulness of his accusations. In short, while this evidence may be properly considered as a matter of the record, I do not find it to be determinative, or of significant probative value, in the instant case.

From this it is clear that the presiding official did not exclude the agency's polygraph evidence. Rather, he found the results of that examination unpersuasive.

The results of polygraph tests were initially rejected by the Federal courts because they lacked a basis in "well-recognized scientific principle or discovery." *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Generally, over the years the courts have continued to refuse to accept such results in criminal cases; see *Marks v. United States*, 260 F.2d 377 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959), as well as civil cases. See *Aetna Insurance Co. v. Barnett Brothers, Inc.*, 289 F.2d 30 (8th Cir. 1961).

Recently, because of the increasing sophistication and reliability of polygraph tests, many Courts of Appeals have given district judges wide discretion to admit polygraph results where a proper foundation is laid by the party seeking their admission. *E.g.*, *United States v. McIntyre*, 582 F.2d 1221, 1226 (9th Cir. 1978); *United States v. Bursten*, 560 F.2d 779 (7th Cir. 1977); *United States v. Marshall*, 526 F.2d 1349 (9th Cir. 1975); *cert. denied*, 426 U.S. 923 (1976); *United States v. Mayes*, 512 F.2d 637 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975); *United States v. Infelice*, 506 F.2d 1358 (7th Cir.), *cert. denied* 419 U.S. 1107 (1974); *United States v. DeBetham*, 470 F.2d 1367 (9th Cir.), *cert. denied*, 412 U.S. 907 (1972).

Our consideration of these sources convinces us that the presiding official was within his authority both in considering the results of the polygraph test on the issue of Student X's veracity, and in attributing little significance to those results. Our decision is necessarily limited to the facts and circumstances present in this case, and in approving the presiding official's exercise of discretion we do not imply that taking a polygraph examination will be required under any circumstances or that the results of such a test must be accepted into evidence or accorded any specific weight in the final decision. We affirm here only this presiding official's sound exercise of judgment in the instant case.

We also find entirely proper the presiding official's refusal to draw any adverse inferences from respondent's decision not to submit to a polygraph examination. The courts have consistently held that the refusal of a person to take a polygraph test is inadmissible. See *United States v. Bando*, 244 F.2d 833 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957); *Aetna Insurance Co. v. Barnett Brothers, Inc., supra.* Accordingly, this Board will not permit any adverse inferences to be drawn from an individual's refusal to submit to a polygraph examination.

In considering whether to allow polygraph examinations into evidence, and in determining the weight to be given such evidence, the presiding official should consider a number of factors. The majority of cases where results of polygraph tests have been excluded from evidence have involved attempts by parties to bolster

their own testimony by test results which demonstrate truthful responses to certain questions. *E.g., United States v. Gloria,* 494 F.2d (5th Cir.), *cert. denied,* 419 U.S. 995 (1974); *United States v. Sockel,* 478 F.2d 1134 (8th Cir., 1973). The principal factors cited by the courts in denying admissibility include: (1) the possibility that a person who is in fact practicing deception might "beat the machine" and appear truthful, *United States v. Alexander,* 526 F.2d 161, 167 (8th Cir., 1975); (2) the likelihood that a jury would give significant, if not conclusive, weight to a polygrapher's opinion as to a witness' truthfulness in responding to a question bearing on an ultimate issue in a criminal case (*Id.* at 168);[1] and (3) the party's failure to lay an adequate foundation for the testimony by demonstrating the polygraph's substantial reliability and acceptance and establishing the competence of the examiner and the examination technique. *United States v. DeBatham,* 348 F. Supp. 1377, 1384 (S.D. Cal.), *aff'd* 470 F.2d 1367 (9th Cir.), *cert. denied,* 412 U.S. 907 (1972).

These factors should also be considered in determining the weight to be accorded polygraph examinations. The presiding official was therefore quite correct in giving weight to the fact that the qualifications of the examiner were not set out in the record. The evidence relied upon by the agency to establish those qualifications recites only that the examiner was a police officer and that a judge of the Superior Court of Alaska approved giving the test. These statements fall far short of the evidence necessary to qualify the examiner to give expert testimony on the results of an examination.

Absent the submission of information to qualify the examiner, the results of the test alone are of little use. As the Committee on Government Operations found, "The operator of the polygraph is generally conceded to be the most important component of the "lie-detection technique." House Comm. on Government Operations, *The Use of Polygraphs and Similar Devices by Federal Agencies,* H.R. Rep. No. 94-795, 94th Cong., 2d Sess. 32 (1976). Yet, in 1964, experts in the field concluded that not more than 20 percent of the persons who then conducted polygraph examinations were competent to do so. Inbau and Reid; *The Lie-Detector Technique: A Reliable and Valuable Investigative Aid,* 50 A.B.A.J. 470, 473 (1964).[2]

[1] Although juries do not sit in Board proceedings, the presiding official needs also to guard against the error of giving undue weight to such testimony in drawing conclusions.

[2] More recent studies indicate that, properly used, the accuracy of the polygraph in detecting insincerity is 70% or greater. *See,* Horvath and Reid, *Reliability of Polygraph Examiner Diagnosis of Truth and Deception,* 62 J. Crim. L.C. & P.S. 276 (1971); Reid and Inbau, *Truth and Deception,* 234

The type of equipment used, the examiner's training, and his familiarity with the equipment are only a few of the most obvious factors which must be considered, but which are not included in this record. In addition to the numerous factors which may affect the reliability and validity of polygraph examinations themselves, the examiner's role in the process requires that he be skilled in performing many functions other than the technical operation of the machine, such as:

—Conduct the pretest interview of the subject in order to put the subject in the right frame of mind for taking the test. This function includes allaying undue anxiety created by the test situation and instilling the myth of the infallibility of the polygraph machine and the polygraph technique.

—Frame questions to cover precisely and simply the heart of the matters under inquiry.

—Interpret polygraph results to distinguish between responses indicating deception and those probably caused by other factors.

—Detect symptoms of mental instability of the subject without administering psychological screening tests.

—Detect symptoms of the influence of depressant drugs without administering blood or urine tests.

—Detect behavioral indications of deception during the course of the examination.

—Detect other attempts to "beat the machine."

Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials,* 15 American Criminal Law Review 29, 45 (1977). See also, Dennehy, *The Status of Lie Detector Tests in Labor Arbitration,* 1980 Labor Law Journal 430.

Without evidence of the examiner's qualifications and abilities in these areas, we find that the agency has failed to show that the results of Student X's polygraph test were worthy of great weight in the ultimate determination of fact.

Accordingly, we find that the presiding official's decision does not represent an erroneous interpretation of law.

We also reject the agency's attempt to treat documents in the record before the field office as "new" evidence which would lead us to reopen this case. The report of the psychologist and the statement by Student Y (erroneously referred to as "Student Z" in the petition), clearly were considered by the presiding official in reaching his decision. The other two matters (statement corroborating respondent's position and the written statement of Student

(1966); Burkey, *Privacy, Property and the Polygraph,* 18 Lab. L.J. 80 (1967), among others.

X) were also a part of the record before the presiding official and were considered by him. Although the agency asserts these documents are new and material because they were not properly considered, it is evident that the thrust of the agency's argument is that, although considered, the presiding official gave too much weight to the corroborating statement, and too little weight to Student X's statement. We note, as to the latter, that the student's statement is subject to interpretation in two different ways, and that the presiding official interpreted it the same way as, apparently, did the investigators who took an oral statement from the student.

Such an allegation does not render the evidence new. If cognizable as criteria for review under 5 C.F.R. 1201.115 at all, the evidence would be supportive of a contention that the presiding official had made an error of law by failing to apply the proper evidentiary standard. In this regard, 5 U.S.C. § 7701(c)(1)(B) provides that an agency's decision shall be sustained if it is supported by a preponderance of the evidence. The Board's regulations, at 5 C.F.R. 1201.56(a)(ii), reference the statutory standard and define "preponderance of the evidence" as:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

Based on our review of the initial decision, there is no reason to doubt that the presiding official applied this standard. Further, the Board will not reconsider the factual findings made by the presiding official simply on the basis of the agency's allegation that he failed to give sufficient weight to the evidence introduced on its behalf, and gave too great credence to the evidence submitted by respondent. While we are aware that courts have frequently upheld dismissals of Federal employees on the basis of sexual conduct, see *Vigil v. Post Office Department of the United States*, 406 F.2d 921 (10th Cir., 1969), *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969), the evidence must be weighed with particular care where the charges place a "badge of infamy" on the employee. *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir., 1969). Based on the record before us, we decline to reopen the case in order to again examine the evidence already thoughtfully considered by the presiding official.

With respect to the agency's contentions concerning the evidence it would have introduced had it been given the opportunity to go to hearing, we find no merit to the argument that such evidence should be considered at this stage in the proceedings. It is the employee, rather than the agency, who has the statutory right to a

hearing (5 U.S.C. § 7701(a)(1)). However, the Board has provided by regulation that a presiding official may, at his or her discretion, grant an agency's request for a hearing (5 C.F.R. 1201.25(b)). The record fails to indicate that the agency made such a request. It does show, however, that the presiding official informed the agency that the hearing would not occur as scheduled, and that the record would remain open for the submission of further evidence or argument. The agency had adequate time to submit additional evidence or request a hearing, and it acted at its own peril in not doing one or the other.

We note also the agency's contention that the presiding official erred in treating a letter it wrote after the close of the record as a request to reopen the record. We find no error in this regard and note that the matter to which the agency objected (the introduction of a possible defense of reprisal by the agency) was neither discussed by the presiding official in the initial decision nor asserted by respondent in his reply to the petition for review.

Finally, the agency challenges the method by which the presiding official ordered it to effect appellant's restoration to duty. It argues that any order issued by this Board requiring an agency to cancel a personnel action is contrary to 5 U.S.C. § 302 and FPM Chapter 274, "Corrective Actions." [3] It also contends that since an order to cancel the removal action has the effect of returning an appellant to his former position, the agency will be required to remove the employee who was placed in that position upon appellant's removal. Instead, the agency submits that it should retain the right to simply reinstate appellant in lieu of cancelling the original action.

The agency's reliance on the statute and FPM is misplaced. The Board does not itself cancel the agency's improper personnel action; it orders the agency to do so. Therefore it does not interfere with the delegations of authority which may have been established within a particular agency. The Board's authority to order the agency to cancel a personnel action stems from 5 U.S.C. § 1205(a).[4] This statute gives the Board broad powers to order an

[3] 5 U.S.C. § 302 states in pertinent part that ". . . the head of an agency may delegate to subordinate officials the authority vested in him—(1) by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency . . ." Although the agency fails to identify that portion of FPM Chapter 274 to which it refers, we assume it is to subchapter 1-4, entitled "Restoration after Invalid Adverse Actions", which states: "The Commission instructs the agency to restore the employee to duty if it finds, on employee appeal, that the agency has not followed prescribed procedures in adverse actions . . ."

[4] 5 U.S.C. § 1205(a) states:

"(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board under this title, § 2023 of

agency to take any action which is necessary to give effect to a Board decision, and is in harmony with 5 U.S.C. § 302 since an order by the Board under § 1205 gives the agency head the legal authority contemplated in § 302 to take the personnel action.

Since an improper or unwarranted personnel action is void *ab initio*, the Board finds that the most effective method to insure that all of the ill effects of the improper action have been undone is to render the action null and void by cancellation, and Board orders giving effect to its decisions will ordinarily require the agency to take such action. It is not sufficient to appoint the employee to another position of like pay and grade, even if the appointment is made retroactive to the date of the improper action, because that improper action still remains a part of the record which may prejudice the employee in the future. For this reason it was the practice of the former Civil Service Commission under prior law to "recommend" that agencies cancel personnel actions which were found improper upon employee appeal. 5 U.S.C. § 7701 (1967), 5 C.F.R. § 772.309.[5]

In this regard, while FPM Chapter 274, Subchapter 1-4 does use the word "restore," such restoration may take the form of several types of personnel action, and that the Commission intended restoration to occur through cancellation of the personnel action is plainly demonstrated in FPM letter 296-33, section 5b (July 16, 1976), which sets out the requirements for revisions of Standard Form 50 to correct unjustified or unwarranted personnel actions.[6]

The agency correctly points out that a cancellation order may have the effect of placing two employees in one position. It is certainly true that the agency should then take action to place one of the employees in another position. This, however, is an entirely separate personnel action, which must itself be taken in accordance with applicable law and regulation for such cause as will promote the efficiency of the service. In most cases, action by the agency should take the form of reassigning the new employee to another position. The Board can of course envision circumstances when it

---

Title 38, or any other law, rule or regulation, and subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order; . . ."

[5] These recommendations were binding on the agency.

[6] Pursuant to that issuance, an agency must purge its files of all references to the improper action, and the SF-50 cancelling the action must be so worded that it will not indicate it is issued as a result of an adverse action which was reversed by the Board. It has been superseded by FPM Supplement 296-31, Subtable 13, page v-80-31 (July 9, 1979) which sets forth similar requirements.

would promote the efficiency of the service to reassign the restored employee, but such circumstances will arise infrequently.[7] The resolution of this problem is the responsibility of agency management, however, and the Board will not ordinarily review the agency's decision.[8]

IV. CONCLUSION

As set forth above, our review of the petition submitted by the agency reflects that it failed to submit any evidence or argument which meets the criteria for review. For the same reasons, we find also that the agency has not advanced any argument which would cause the Board to reopen the case on its own motion.

Accordingly, the petition for review is hereby DENIED. The initial decision of the presiding official remains the decision of the Board, and shall become final five (5) days from the date of this opinion and order. 5 C.F.R. § 1201.113(b).

The Department of the Interior shall comply with the order of the presiding official. In doing so the agency shall:

(1) adhere to the requirements of FPM Supplement 296-31, Subtable 13 with respect to respondent's Official Personnel Folder;

(2) destroy all documents in all unofficial folders maintained by any persons within the agency that are copies of documents

[7] Were appellant to be restored to his position in the middle of a school term, the agency may find that the disruption of the educational process attendant with replacing another teacher who has already established a good student-teacher relationship justifies assigning appellant to another position. This is plainly not the case at this time. The mere fact that cancellation of the action would require the agency to reassign the other employee is not sufficient justification.

[8] Ordinarily the Board's participation in a matter will end upon receipt of a certification of compliance with its order. In many circumstances such compliance can be effectuated merely by cancellation of the personnel action in question. However, in determining what future action should be taken with respect to appellant, the agency is cautioned that any personnel action taken in reprisal for the exercise of an appeal right is a prohibited personnel practice. 5 U.S.C. § 2302.(b)(9). Under 5 C.F.R. § 1201.181(a) an appellant may petition the Board for enforcement of any final decision. Under 5 C.F.R. §§ 1201.182 and 1201.184(a) the Board may take "all necessary action to ascertain [compliance and] . . . undertake efforts to obtain compliance." In giving effect to the purpose of these provisions the Board's power is both broad and continuing in nature. *See* S. Rep. No. 95-969, 95th Cong., 2d Sess. 29 (1978). Thus, subsequent agency action concerning a prevailing appellant, even if not constituting a matter otherwise directly appealable to the Board, may be the subject of a petition under 5 C.F.R. § 1201.181, if for example, the agency's formal cancellation of appellant's removal is a mere subterfuge while other actions are taken to avoid substantive compliance.

which have been purged from the Official Personnel Folder pursuant to FPM Supplement 293-31, Subchapter S8-4a(4);

(3) destroy all documents in all unofficial folders maintained by any persons within the agency which pertain to matters which are the subject of this appeal;

(4) submit evidence of compliance to the field office within ten (10) days of the date of this opinion and order, such evidence to include a copy of the SF 50 cancelling the removal and an affidavit from each custodian of any file or folder concerning respondent certifying compliance with subparagraphs 1, 2, and 3, above.

This is the final action of the Merit Systems Protection Board in this appeal. Respondent has the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed no later than thirty (30) days after respondent's receipt of this opinion and order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 26, 1980*